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Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?

Mark B. Baker

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ARTICLES

**PRIVATE CODES OF CORPORATE
CONDUCT: SHOULD THE FOX GUARD
THE HENHOUSE?**

MARK B. BAKER*

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I. INTRODUCTION

Multinational enterprises (MNEs),¹ gigantic corporations of the Western World, often have incomes greater than many developing nations' gross national products (GNPs). They conduct much of their business in small nations, generating huge profits at the expense of these small countries and their citizens. Further, MNEs have often exploited the resources of developing nations, which lack the infrastructure to effectively regulate the activities of MNEs within their borders. Public international law has also proved ineffective at regulating MNEs.

This Article asserts that MNE conduct should be self-regulated, specifically through private internal codes of conduct. Private codes are declarations of standards that MNEs must require of their employees. Typical standards include a canon of ethics and statements not to exploit nations where the MNEs do business. These private codes are flexible, of individually tailored design, easy to apply, and possess internal pressures for compliance. Thus, they are the best available, most effective form of regulation.

Part II discusses the history of MNEs, focusing on the underlying difficulties of their regulation. Parts III through VI trace the history of public codes of conduct, while Part VII explores the effect of public international law on MNEs. The remainder of the Article examines the history, usefulness, and desirability of private codes of conduct. This author conducted an informal survey of several large MNEs.² The results of this survey are presented in Part IX.

1. Multinational enterprises are also referred to as multinational corporations (MNCs) or transnational corporations (TNCs).

2. The MNEs surveyed were taken from a 1992 *Forbes* list of the largest U.S. multinationals. *U.S. Corporations With the Biggest Foreign Revenues*, *FORBES*, July 20, 1992, at 298. The author sent surveys to the 50 largest MNEs and received 9 responses.

II. HISTORY AND ORIGIN OF THE MULTINATIONAL CORPORATION

Intellectual archaeologists traced the origins of MNEs to the fifteenth century Fuggers merchant family, who were based in Augsburg and operated various businesses throughout Europe.³ Others linked the origins of MNEs to pre-nineteenth century companies, which, as heavy users of raw materials, sought their supply of these materials abroad.⁴ However, there is little documentation to verify the conduct of MNEs during their earliest ventures.⁵

In the seventeenth and eighteenth centuries, great merchant companies emerged, often as a result of imperialism and colonialism in an era of exploration.⁶ They were usually granted royal charters or monopolies to conduct trade in certain geographic zones on the globe.⁷ The British East India Company, for example, possessed import monopolies in Europe on all tea from Asia.⁸ Great monopoly power characterized the activities of these early colonial trading companies.⁹ These prototypical MNEs were the precursors to the modern economically interdependent world.¹⁰

Nineteenth century improvements in transportation enabled the multinational trading company to enter foreign markets and to acquire many of the features associated with MNEs today. The end of World War II caused a surge of U.S. investment in Europe which sent MNEs in search of new manufacturing ventures as opposed to import/export transactions.¹¹ By the late twentieth century, technological innovations such as instantaneous communication, information systems, and the electronic transfer of large sums

3. See KWAMENA ACQUAAH, *INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY* 45 (1986).

4. *Id.*

5. *Id.*

6. PHILIPPE CHALMIN, *TRADERS AND MERCHANTS, PANORAMA OF INTERNATIONAL COMMODITY TRADING* 7-9 (Erica E. Long-Michalke trans., 2d ed. 1987). See generally LOUIS TURNER, *MULTINATIONAL COMPANIES AND THE THIRD WORLD* 17-28 (1973) (discussing the "drive for empires" of Europe and America in the late 19th century).

7. CHALMIN, *supra* note 6, at 7-9.

8. *Id.*

9. *Id.*

10. DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 570 (1973). The rise of world empires from the fifteenth to the twentieth centuries confused the relationships between nations. *Id.* Colonialism created relations among distant peoples that were formerly only available by peoples within a nation. *Id.* Laws were enacted into treaties, and "international" trade became trade within an empire. *Id.*

11. ACQUAAH, *supra* note 3, at 45.

of money across the oceans characterized MNE ventures.¹²

While MNEs historically organized in a wide variety of forms, they shared some common characteristics. These included managerial skills, access to and control of technological information, and the ability to attract talent.¹³ These qualities gave MNEs a great deal of power, which they continue to hold today.

The distinguishing mark of today's MNEs is their actual, potential, and perceived power and influence in host countries.¹⁴ Through direct participation in vital sectors such as production, distribution, and service, MNEs presently maintain as much influence within host countries as they did in the past.¹⁵ Many MNEs are economically more powerful than nations.¹⁶ In 1985, for example, the 350 largest MNEs had combined sales of \$2.7 trillion, roughly one-half of the combined GNP of the industrial market economies and several hundred billion dollars greater than the combined GNPs of all developing countries, including China.¹⁷ Yet, the extraordinary profits made by multinationals have often come at others' expense.¹⁸ Abuses have traditionally included the exploitation of indigenous natural resources and labor supplies.¹⁹

Today, however, MNEs may enter a host country with slightly different, though not necessarily unselfish, reasons. For example, MNEs may conduct activity internationally to avoid expensive compliance with safety or environmental regulations in their own

12. See JACK N. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE: TENSIONS AMONG THE NORTH ATLANTIC COUNTRIES 16-19 (1970).

13. See generally ACQUAIAH, *supra* note 3, at 43-44, 46, 48.

14. Hans W. Baade, *Codes of Conduct for Multinational Enterprises*, in 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 407 (Norbert Horn ed., 1980).

15. *Id.* at 409.

16. SENATE SUBCOMMITTEE ON INT'L TRADE OF THE SENATE COMM. ON FINANCE, 93D CONG., 1ST SESS., HEARINGS ON MULTINATIONAL CORPORATIONS 404 (Comm. Print 1973).

MNEs "often possess considerably greater material resources than many nation-states which enables them under certain conditions to exert more powerful influences in the international sphere than the governments of many middle-sized and small states." WERNER J. FELD, NONGOVERNMENTAL FORCES AND WORLD POLITICS: A STUDY OF BUSINESS, LABOR, AND POLITICAL GROUPS 4 (1972).

17. Gerard Piel, *Globalopolies*, 254 NATION 652, 652 (1992).

18. Critics of MNEs cite the following abuses: the exploitation of local labor and resources; the loss of profits to the host country which are earned locally; MNEs' use of scarce local capital to finance their operations; and MNEs' failure to import capital to host countries. See ROBERT COHEN & JEFFREY FRIEDAN, THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER 161-63 (Edwin P. Reubens ed., 1981).

19. *Id.* at 161.

country.²⁰ Relocation enables MNEs to hire less expensive foreign labor, thus avoiding the high cost of domestic labor and the demands of domestic labor unions.

Questionable MNE business tactics have plagued international arrangements between host countries and MNEs. Although host countries have long been aware of the one-sided nature of their agreements, they are often powerless to negotiate.²¹ Host countries, lacking information, capital, technology, and a skilled labor supply possess little bargaining power. Moreover, host countries desperately need foreign investment to stimulate their economies and feed and clothe their population.²² Consequently, host countries have been vulnerable to MNEs exploitation.

In succumbing to the pressures of MNEs, many host countries experience disastrous consequences. The absence of a governing body to monitor and control the relationships between MNEs and host countries permits corruption to pervade MNE activity. Bribery perpetuates a locally-accepted business practice²³ as competition among multinationals forces corporations to hire local "agents" with access to influential people in developing areas.²⁴ Due to corruption, host countries sometimes become unstable, subject to political upheaval or revolution.²⁵ Additionally, MNE activ-

20. One of the most debated issues regarding the proposed U.S.-Mexico Free Trade Agreement is the prevention of environmental abuses by U.S. companies along the Texas-Mexico border. Some U.S. environmentalists have argued that lax Mexican standards will entice companies to relocate to Mexico to avoid costly U.S. regulations. *Mexico Announces Plan to Protect Environment Along Northern Border*, 8 Int'l Trade Rep. (BNA) No. 43, at 1594-95 (Oct. 30, 1991).

21. COHEN & FRIEDEN, *supra* note 18, at 163.

22. Theodore Panayotou, *Counting the Cost: Resource Degradation in the Developing World*, in *THE FLETCHER FORUM OF WORLD AFFAIRS* 270, 276 (1990).

23. Bribery remains a problem today, as evidenced by recent steps of the Organization for Economic Cooperation and Development (OECD) to curb bribes in international trade and investment. See *OECD to Develop Guidelines to Curb Bribery in International Transactions*, BNA, Apr. 28, 1993, available in LEXIS, Nexis Library, Drexec File.

24. Barry Kramer, *Payments for Foreign Contracts*. . . , *WALL ST. J.*, Jan. 27, 1978, at 8.

25. For example, during the Peruvian revolution of 1968, International Petroleum Corporation (IPC) agreed with Peruvian President Belaúnde to return ownership of oil fields to the government. LOUIS TURNER, *MULTINATIONAL COMPANIES AND THE THIRD WORLD* 11-12 (1973). A scandal erupted over a missing page in the contract's text. *Id.* The ruling party divided, causing the military to suspend civilian rule and expropriate IPC's Peruvian assets. *Id.*

A second example is the Chilean coup of 1973. See Jonathan Kandell, *Foreign Companies Aided Anti-Allende Strikers, Chileans Say*, *N.Y. TIMES*, Oct. 16, 1974, at 8. After the military coup of 1973 overthrew President Salvador Allende, MNEs and the CIA revealed that they had financed anti-Allende strikes. *Id.* The revolution stopped Allende's policy of nationalizing copper mines, 90% of which were MNE owned. *Id.*; see also ACQUAAN, *supra*

ity aggravates existing class divisions. Profits from MNE activity often only reach the hands of the privileged, increasing the dichotomy between the wealthy land owning bureaucrats and the poor, uneducated, and unskilled labor supply.²⁶

Another negative effect of MNE domination is their use of indigenous natural resources without regard to the consequences of exploiting and destroying those natural resources.²⁷ When the resources run out, or when their market price becomes so low that it prevents further development, the host country is left with unemployed, relatively untrained workers. While one can observe a host country's depletion of natural resources, increased unemployment, or environmental contamination, one cannot measure all the destructive effects of MNE activities in developing nations.²⁸

The various destructive forces, endless cycles of poverty, and human oppression resulting from unfettered multinational activity cannot be easily categorized. The remarkable economic expansion of the last fifty years instigated by MNEs has not necessarily improved the well-being of the vast majority of people living in underdeveloped urban and rural areas.²⁹ For these people, economic development has not meant economic growth. MNE profits have not "trickled down" as theorized, and while some changes have occurred, they are inadequate to be of significant aid to a suffering population.³⁰

Poverty's extent in developing nations is stunning.³¹ While es-

note 3, at 38 (MNEs "will stop at nothing including provoking or engineering the overthrow of legitimately elected governments in Third World countries where it serves their purpose.").

26. Home country nationals tend to dominate management positions. See STEFAN H. ROBOCK & KENNETH SIMMONDS, *INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES* 10 (3d ed. 1983). Moreover, host countries are often apathetic to the needs of their unskilled labor supply. For example, in negotiations between the United States and Mexico on the North American Free Trade Agreement (NAFTA), Mexico's government has refused to change Mexico's labor practices. James Zimmerman, *Laboring Under No Illusions*, *RECORD*, July 30, 1993, at 6 ("Government officials have gone so far as to advertise in U.S. business magazines that manufacturers can reduce their labor costs to less than \$1 per hour (including benefits) if production is moved to Mexico.").

27. Panayotou, *supra* note 22, at 271.

28. For example, in Thailand an area of undisturbed forest was rapidly cleared without regard to any long-term planning considerations. Today, the area is devastated by soil erosion and salinization, rendering forestry and agriculture impossible. *Id.* at 272.

29. See *MULTINATIONAL MANAGERS AND POVERTY IN THE THIRD WORLD* 4 (Lee A. Tavis ed., 1988) [hereinafter *MULTINATIONAL MANAGERS*].

30. *Id.*

31. *Id.*

timates vary, at least two billion people do not have the necessary resources to live.³² They are plagued by preventable illness, lack of food, and inadequate planning for natural disasters.³³ Millions of people live in villages and slums where conditions are well below the standard that most Westerners would characterize as abject poverty.³⁴ People are poor, hungry, diseased, illiterate, unemployed, and die young.³⁵

These conditions raise serious issues for MNEs. What should be the proper relationship between modern MNEs and the host country's government? How can MNEs best balance the interests of their shareholders against the interests of the domestic foreign economy where they operate?

To decrease objectionable consequences and insure increased long-term stability in multinational business transactions, host countries want tools to gain more control over the actions of MNEs operating within their domestic borders. In general, host countries desire a system that will ensure that MNEs act ethically and allow for scrutiny of MNE practices.

There are many viable options, including educating the local workforce or subsidizing foreign economic development programs. Nonetheless, a more practical and realistic approach for the corporate practitioner or planner is the development of corporate codes of conduct.

III. PURPOSE OF CODES OF CONDUCT

A code of conduct is a written statement of standards by which a host country can expect MNEs to act.³⁶ Codes should bring predictability and certainty to the relationship, while providing guidelines within which both parties can operate knowledgeably.³⁷

A code of conduct can serve several useful purposes.³⁸ A well

32. *Id.* at 11.

33. *Id.* at 12.

34. *Id.*

35. *Id.*

36. See Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 *FORDHAM INT'L L.J.* 881, 885 (1991); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil & Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 *GEO. L.J.* 1559, 1559 n.1 (1990).

37. See Hansen & Aranda, *supra* note 36, at 886-87.

38. The function or purpose of a code of conduct is limited only by the imagination of

drafted code will preserve a national government's independence by mandating that MNEs decrease their involvement in the domestic political arena. A code, for example, could attempt to stimulate the economy of undeveloped regions of the host country or to redistribute the wealth to the labor class. Activities such as bribery, tax evasion, or other practices that defraud the public could be prohibited. Codes could regulate anti-competitive behavior, such as dumping or protectionism. Codes could also include moral and ethical standards of behavior. Additionally, codes might require that host countries fairly compensate MNEs for actions such as expropriation or nationalization.

Other provisions could reduce the risk of court ordered judgments and the risk of international investment flows. These goals would be especially suitable for U.S. companies facing intrusive and complex laws and regulations on the domestic front which their competitors do not face.

IV. HISTORY AND ORIGIN OF CODES OF CONDUCT

While most modern corporate codes have been introduced in the last twenty years,³⁹ codes of conduct have a rich origin from two historical concepts.⁴⁰ The first concept is the distrust of corporate control, dating back to ancient Roman times when the corporate structure was first utilized.⁴¹ Roman law heavily regulated corporations because the population received them with great animosity.⁴²

the drafter. One author summarizes the purpose of codes of conduct as "establishing an agreement between governments on rules of governmental conduct, harmonizing national laws and regulations, supplementing national laws, providing internationally accepted models for national laws, increasing the effectiveness of national laws, [and] providing alternative ways to subject private enterprise to public and governmental policies." RAYMOND J. WALDMANN, *REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT* 21-23 (1980).

39. See Pitt & Groskaufman, *supra* note 36, at 1559.

40. For a detailed discussion of the history of corporate codes of conduct, see *id.* at 1574-1600.

41. Blackstone ascribes the development of the corporation to Numa Pompilius (715 - 672 B.C.) who found Rome "torn to pieces by the two rival factions of the Sabines and Romans . . ." 1 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 468-69 (photo. reprint 1978) (1783). Pompilius thought it wise to divide these two groups into many smaller ones comprised of specialized trades and professions. *Id.*

42. Rome scrutinized and supervised every aspect of corporate formation, management, and dissolution. W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1 (Permanent ed. 1990).

This same skepticism can be seen in the middle of the eighteenth century of U.S. history.⁴³ United States colonists were suspicious of corporations because corporations represented the privileged society against which the settlers were rebelling.⁴⁴ Eventually, as taxes were needed for major government works, the government granted charters to private organizations to serve in semi-public capacities such as canal, bridge, and turnpike companies.⁴⁵ As the Industrial Revolution demanded more capital, the corporate structure, with its ability to attract capital and limit shareholder liability, became an essential part of the United States economy.⁴⁶

A second historical concept integral to the development of modern corporate codes was the North American belief that self-regulation was more effective and preferable than government regulation.⁴⁷ However, industry self-regulation existed prior to the development of the North American economy.⁴⁸ Merchant and craft guilds of Medieval Europe regulated their members' conduct, provided for their social well-being, and controlled the markets.⁴⁹ Familiar examples of these self-regulating units survive today in government sanctioned forms, such as the National Association of Securities Dealers.⁵⁰

These two historical concepts, combined with the government and business scandals of the 1980s,⁵¹ laid the foundation for the modern idea that public corporations should develop and enforce written codes of corporate conduct.⁵²

43. *Id.* § 6.

44. I. MAURICE WORMSER, *FRANKENSTEIN, INCORPORATED* 28 (1931).

45. *Id.* at 31.

46. *Id.* at 32.

47. Pitt & Groskaufmanis, *supra* note 36, at 1561, 1576-78.

48. See ANTONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT* 6 (1984).

49. *Id.* at 4.

50. Pitt & Groskaufmanis, *supra* note 36, at 1578.

51. Pitt and Groskaufmanis credit a large degree of corporate self-regulation and the emergence of corporate codes of conduct to the insider trading scandals that occurred in the United States in the 1980s. "The evolution of the insider trading ban under section 10(b) of the [Securities and] Exchange Act and rule 10b-5 fostered the development of internal codes of conduct. [E]xtensive and complex compliance and training programs [were developed] to diminish these conflicts of interest." *Id.* at 1588-89 (citations omitted).

52. *Id.* at 1598-1600.

V. CODES OF CONDUCT AND ETHICS

Although corporate codes are becoming more prevalent in all types of corporations, there is a greater need for them in the multinational context because of the complex ethical and moral issues raised by the commercial activities of MNEs. Multinational managers are aware that the poverty which pervades developing nations cannot be allowed to continue.⁵³ "The most fundamental human right is to survive, and no matter where the minimum standard for basic human needs is set, millions and millions of people fall far short of that threshold."⁵⁴

Multinationals have a close relationship to the poor through their commercial activities in developing countries.⁵⁵ As an economic liaison between developed and developing countries, MNEs provide a means of balancing international resources.⁵⁶ Because they control the exchange of resources and are closely tied to local development issues, MNEs have many links to the host country's people and are positioned to aid these people.⁵⁷ Yet, MNEs which accept the challenge of overcoming poverty must balance competing responsibilities: on the one hand, maximizing shareholder profits, and on the other hand, searching for solutions to the poverty crisis in poor developing nations.

Fortunately, as the scrutiny of MNEs increases, there is a growing international sensitivity to the non-economic consequences of their economic activity.⁵⁸ As more attention focuses on international business, increased adoption of codes of conduct will aid in the establishment of a more ethical atmosphere. Arguably, in the long-run, real or perceived unethical conduct by multinationals is likely to put the social acceptability and the credibility of the free market system at stake. Only if entrepreneurs offer constructive solutions to important societal problems in an ethically acceptable way will MNEs enjoy freedom of action. Ethical conduct in developing nations is vital to the long-term existence of any corporation.⁵⁹

53. MULTINATIONAL MANAGERS, *supra* note 29, at 5.

54. *Id.* at 4-5.

55. *Id.* at 5.

56. *Id.*

57. *Id.*

58. Klaus M. Leisinger, *Multinationals and the Third World: Sell Solutions, Not Just Products*, N.Y. TIMES, Feb. 21, 1988, § 3, at 3.

59. *Id.*

Even if no recognized legal duty exists, a growing number of experts insist that corporations have a moral responsibility to enforce high standards, especially in countries unable to regulate MNEs.⁶⁰ Recognition of the importance of social responsibility toward foreign countries is one of the main forces driving the increased use of codes of conduct.⁶¹ While codes may have different approaches to the various ethical problems, they uniformly state a desire to break the cycle of oppression in host countries and to provide a decision-making tool for MNEs as they face difficult moral dilemmas.

VI. RECOGNITION OF MODERN CODES OF CONDUCT

The recognition of codes and their accompanying benefits is steadily increasing.⁶² Between 1971 and 1980, virtually all major international governmental organizations interested in international trade and investment developed detailed proposals for MNE codes of conduct.⁶³ These organizations include committees in the United Nations, the International Labour Organization (ILO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Economic Community (EEC), and the Organization of American States (OAS).⁶⁴ Additionally, non-governmental international organizations pushing for codes of conduct include the International Confederation of Free Trade Unions (ICFTU) and the International Chamber of Commerce (ICC).⁶⁵

VII. PUBLIC INTERNATIONAL LAW

The United Nations (U.N.) is a principal actor in the push for codes of conduct. The most significant and controversial code promulgated by the U.N. is entitled the "Code of Conduct for Transnational Corporations" which the United Nations Commission on Transnational Corporations (UNCTC) drafted after 14

60. Stuart Diamond, *Disaster in India Sharpens Debate on Doing Business in the Third World: Corporations Forced to Reassess Risks and to Review Safety Rules*, N.Y. TIMES, Dec. 16, 1984, § 1, at 1 (discussing the 1984 poisonous gas disaster at the Union Carbide Plant in Bhopal, India).

61. See generally Leisinger, *supra* note 58, at 3.

62. See Baade, *supra* note 14, at 408-12.

63. *Id.* at 412.

64. *Id.*

65. *Id.* at 413.

years of negotiations.⁶⁶

The UNCTC, established in 1974,⁶⁷ serves as a forum for the study of issues relating to transnational corporations. It also assists the U.N. Economic and Social Council in developing a code of conduct.⁶⁸ The UNCTC is comprised of up to forty-eight states elected by the Economic and Social Council.⁶⁹

The Economic and Social Council created the Commission with a mandate that its "highest priority of work" was to enact a code of conduct for transnational corporations.⁷⁰ Although work began on the code in 1977,⁷¹ and the UNCTC prepared a draft in 1990, the U.N. has yet to adopt it.

The latest draft is universally applicable to all transnational corporations.⁷² Under the Draft Code of Conduct, transnational corporations are defined as enterprises composed of entities in two or more countries which operate under a related system of decision making.⁷³ The Draft Code is aimed at being "an essential element in the strengthening of international economic and social co-operation . . . to maximize the contributions of transnational corporations to economic development and growth and to minimize the negative effects of the activities of these corporations."⁷⁴

Many host countries view the Draft Code of Conduct, as promulgated by a public international organization, as a necessity.⁷⁵ Public law is viewed by some as the best vehicle for compliance because it may be binding and because the existing laws of developing countries do not address the problems stemming from the activities of MNEs operating within their borders.⁷⁶ Because

66. See *Draft U.N. Code of Conduct for Companies Needs to be More Balanced*, U.S. Aide Says, 7 Int'l Trade Rep. (BNA) No. 43, at 1650 (Oct. 31, 1990) [hereinafter *Conduct for Companies*]. A detailed explanation of the history and origin of this proposed code is beyond the scope of this paper.

67. 1 Y.B. INT'L ORG. 1160-61 (Union of Int'l Assoc. ed., 1990-91).

68. *Id.*

69. *Id.*

70. *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, U.N. E.C.O.S.O.C., 2d Sess., Annex, at pmb1., U.N. Doc. E/1990/94 (1990) [hereinafter *Draft Code of Conduct*].

71. Pieter Sanders, *Implementing International Codes of Conduct for Multinational Enterprises*, 30 AM. J. COMP. L. 241, 242 (1982).

72. *Draft Code of Conduct*, *supra* note 70, at ¶ 1.

73. *Id.*

74. *Id.* at pmb1.

75. Baade, *supra* note 14, at 416.

76. See P. ERON BONDZI-SIMPSON, *LEGAL RELATIONSHIPS BETWEEN TRANSNATIONAL CORPORATIONS AND HOST STATES* 37 (1990); CYNTHIA D. WALLACE, *LEGAL CONTROL OF THE MUL-*

the U.N. wrote the proposed Code, it would become part of the body of public international law that governs member states of the U.N. and would provide universal standards that all developing nations could turn to for protection.⁷⁷

The Draft Code of Conduct is meant to be comprehensive, incorporating more specialized texts developed by UNCTAD, ILO, and the ICC.⁷⁸ The EEC, the Council of Europe, the OAS, and the ICFTU also provided input.⁷⁹ Under the Draft Code, MNEs would generally be required to respect the rights of individuals in host countries and to avoid interfering with government regulation.⁸⁰

The Draft Code imposes broad duties relating to human rights, corrupt payments, local ownership and control, compliance with national economic and development objectives, restrictive business practices, taxation, and transfer pricing.⁸¹ In addition, MNEs must disclose to the public of the host country information about the corporation, including financial data.⁸²

The Draft Code of Conduct is hotly debated, and no end to the controversy is in sight. Much of the debate over the Draft Code revolves around its heavy restrictions on MNEs operating in foreign countries because host governments are not forced to abide by equally restrictive guidelines on issues such as expropriation, national treatment, profit repatriation, and respect for international law.⁸³ Another reason the Draft Code is facing difficulty is that developing countries are not pressing for its adoption to the degree

TIONAL ENTERPRISE: NATIONAL REGULATORY TECHNIQUES AND THE PROSPECTS FOR INTERNATIONAL CONTROLS 83-84 (1982).

77. Less developed countries lacking indigenous interests have consistently pursued what is called the maximalist position: one calling for legally binding, internationally enforceable rules of conduct for MNEs. On the other hand, the international business community and some leading home countries have adopted the minimalist position, which is based on voluntary, rather than enforceable guidelines. Baade, *supra* note 14, at 440.

78. *Id.* at 440-41.

79. *Id.*

80. *Draft Code of Conduct*, *supra* note 70, ¶¶ 14, 16-19.

81. *Id.* ¶¶ 21-34.

82. *Id.* ¶¶ 44-46. Other selected provisions require that MNEs:

- 1) conduct business with regard to the health and safety of consumers and the environment;
- 2) respect human rights and fundamental freedoms;
- 3) provide certain corporate information to an employee representative, and to disclose whether their products have been banned in other countries; and
- 4) reach agreement with the host countries on methods for resolving disputes.

Id.

83. *Conduct for Companies*, *supra* note 66, at 1650.

that they did in the 1970s.⁸⁴

While the Draft Code does provide needed controls over the actions of MNEs, Western countries and corporations view it as too one-sided to be taken seriously.⁸⁵ MNE participation in the making of the Draft Code has been extremely limited,⁸⁶ resulting in a broadly worded document that fails to address the specific needs of individual parties to international transactions.⁸⁷

Even if the varying interests affected by the Draft Code could come together in agreement on its provisions to ensure ratification,

84. *Id.*

85. United States officials indicated that the United States intended to oppose adoption of the U.N. Draft Code of Conduct. Thus, after 14 years of drafting, it appears the Code will receive little support from the United States. *U.S. to Oppose Adoption of U.N. Code on Foreign Investment, U.S. Official Says*, 7 Int'l Trade Rep. (BNA) No. 41, at 1584 (Oct. 17, 1990).

The United States views the Code as being unbalanced, emphasizing restrictions on corporate behavior over host government responsibility. *Conduct for Companies, supra* note 66, at 1650. Raymond Waldmann notes:

In the President's International Economic Report of 1975 which addressed the Transnational Code, the U.S. emphasized that any code dealing with MNE corporations should:

- articulate general principles of good business practice applicable to national as well as multinational enterprises and state-owned as well as privately owned enterprises be voluntary rather than mandatory,
- be nondiscriminatory toward foreign investment,
- acknowledge existing principles of international law (especially those governing the treatment of foreigners and their property),
- endorse international arbitration for settling investment disputes,
- acknowledge the responsibilities of governments to resolve problems arising from conflicting government requirements,
- affirm that governments and enterprises must respect contractual obligations.

WALDMANN, *supra* note 38, at 83.

86. Although the Code is aimed at MNEs, international practice and custom has precluded MNEs from directly participating in the construction and drafting of this proposed legislation. All of the participants, except the ILO, are nation-state representatives. The U.N. traditionally limits business and labor representatives to observer status and grants such representatives only limited rights to be present or speak at formal sessions. See generally Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 750-51.

87. *Id.* at 754.

The failure to allow direct TNC participation in the development of potential international law imposes unnecessary costs on the international legal system. Because the proposed codes do not resolve the underlying political and economic issues, they merely convert these controversies into *legal* issues. Failing to bring the major international actors into this process does little to advance relevant interests and imposes unnecessary risks on the inherently frail international legal system.

Id. (emphasis in original).

the Draft Code would remain practically impotent.⁸⁸ This is because issues regarding the interpretation,⁸⁹ implementation, enforcement,⁹⁰ and constitutionality of the Code present a Pandora's box of questions with no viable answers. Without a way to force U.S. companies' compliance with Code provisions, the U.N. will probably be left with nothing more than a non-binding resolution or declaration of the U.N. General Assembly.⁹¹

Even if the Code is ratified with some enforcement mechanisms, there is still no assurance that it will achieve its goals. Because the Draft Code imposes new costs on MNE development, the financial incentives necessary to attract MNE investment in developing countries may disappear. With all these factors working against the Draft Code, its effectiveness will depend on the degree of consensus among involved host countries.

Public international law acts in much the same way as an order imposed on MNEs without their consent or participation. If public international law is the only accepted way to prevent exploitation and encourage ethical conduct by MNEs, then MNEs are denied the opportunity to install their own measures to achieve these goals.

Thus, when MNEs accept that public law must make changes for them, they admit that they are unable to make these changes from within their own organization. Yet, any truly successful transformation must occur on an individual level. While one MNE cannot single-handedly reform the conduct of international business, it can, however, try to discover and protect against abuses within itself.

88. *Id.* at 757.

89. The Code can be interpreted differently by any number of actors, each with their own interests. Actors may include the host country's government, transnational corporations or their affiliates, trade unions, the U.N. Commission on Transnational Corporations, any non-governmental organization, or another private party. For a more comprehensive listing, see A.A. Fatouros, *The UN Code of Conduct on Transnational Corporations: Problems of Interpretations and Implementation*, in *EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT: MULTINATIONAL CODES AND CORPORATE CONDUCT* 101, 114-15 (Seymour J. Rubin & Gary C. Hufbauer eds., 1984).

90. See Sanders, *supra* note 71, at 243; Richard Schwartz, *Are the OECD and the UNCTAD Codes Legally Binding?*, 11 *INT'L LAW* 529 (1977).

Absent a sovereign to issue commands, a court system to determine violations, or a police force to punish violators, international law is only law if people choose to follow it. Charney, *supra* note 86, at 756-57.

91. Sanders, *supra* note 71, at 243.

VIII. PRIVATE CODES OF CONDUCT

In an increasingly competitive and sophisticated international marketplace, foreign countries are demanding more control over the operations of MNEs within their boundaries.⁹² While public international law has addressed this problem,⁹³ it has done so unsuccessfully.⁹⁴ One solution may lie in private codes of conduct.

Adopting voluntary private codes of conduct is an effective way for MNEs to overcome the limitations of public international law.⁹⁵ A private code of conduct shares the desired results of a public code, but has a greater potential for success than a public code in promoting integrity among international corporate executives. Domestically, corporate codes of conduct have slowly evolved into a customary corporate document.⁹⁶ Moreover, both market and non-market rationales favor adopting private codes internationally.

Private codes ensure that MNE operations are in harmony with the national policies of the countries where they operate and also strengthen the mutual confidence between the MNE and the government of the host country.⁹⁷ Private codes increase political stability in developing nations by increasing the host country's negotiating power with the MNE.⁹⁸ Voluntary codes of conduct can

92. See Charney, *supra* note 86, at 765. Nations, believing that a power struggle is taking place between themselves and MNEs, resist allowing MNEs the power to influence international law. *Id.*

93. See, e.g., *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF/10 (1980), reprinted in 19 I.L.M. 813 (1980); *International Labor Organization: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, reprinted in 17 I.L.M. 422 (1978); *Declaration of the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), 6 U.N. GAOR Supp. (No. 1), U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974).

94. One commentator asserts that public international law has been unsuccessful at regulating MNEs because MNEs have been excluded from participating in the development of international law. Charney, *supra* note 86, at 750-51.

95. "The simple assumption that legally binding is in some sense superior to voluntary codes is questionable. Even a legally binding code is not likely to invoke penalties for infractions. The GATT very rarely authorizes compensatory measures, and the IMF tolerates assorted departures from the standards laid down in its Articles of Agreement." SEYMOUR J. RUBIN & GARY C. HUFBAUER, *EMERGING STANDARDS OF TRADE AND INVESTMENT: MULTINATIONAL CODES AND CORPORATE CONDUCT* 182 (Seymour J. Rubin & Gary C. Hufbauer, eds. 1984).

96. Pitt & Groskaufmanis, *supra* note 36, at 1559.

97. Organization for Economic Co-Operation and Development, *Declaration on International Investment and Multinational Enterprises*, reprinted in 15 I.L.M. 967 (1976).

98. Joel Davidow & Lisa Chiles, *The United States and the Issue of the Binding or*

increase public trust in the business sector and bring multinational activity in line with public expectations.

By implementing their own private codes, MNEs may dissuade the host country's government from enacting restrictive laws. Voluntary domestic measures can also serve as a public relations or marketing mechanism by enhancing the public perception of the MNE in host countries.⁹⁹ The code demonstrates to the host country that the MNE is aware of potential problems and is acting to prevent them. Because codes of conduct often contain provisions regarding the dissemination of corporate information in the host country, the code can even aid the public's understanding of MNEs' needs and behavior patterns.¹⁰⁰

By developing individualized codes of conduct, MNEs can tailor a code to their own needs and the needs of their customers. For example, codes may contain general provisions regarding:

- 1) disclosure and employee behavior;
- 2) integrity of accounting and financial records;
- 3) corporate governance;
- 4) responsibilities as an employer;
- 5) the function of the board;
- 6) description of activities;
- 7) duties to customers; and
- 8) responsibilities to the community.

Moreover, codes of conduct can be narrowly tailored to a MNE's business area. Consequently, by drafting a code around the specific needs of the country, problems, or industry, MNEs can better define the interested parties and thus decrease the potential for serious dispute.

The benefits of a narrowly tailored code are illustrated by con-

Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices, 72 AM. J. INT'L L. 247, 298 (1978).

99. The value of the code as a public relations tool should not be underestimated. Many host countries despise the presence of MNEs within their borders. In foreign investment, for example, it is well documented that Latin American countries have great fears that MNEs, if left unrestricted, could end up owning their entire countries. See Mark B. Baker & Mark D. Holmes, *An Analysis of Latin American Foreign Investment Law: Proposals for Striking a Balance Between Foreign Investment and Political Stability*, 23 U. MIAMI INTER-AM. L. REV. 1, 11 (1991).

100. MNEs should publish information on their structure, activities, and policies to improve public understanding. See George W. Coombe, Jr., *Multinational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Council* 36 BUS. LAW. 11, 14-15 (1980).

sidering the effect of a single code on the activities of a MNE with enterprises in several global regions. Should the code apply equally to nations with hundreds of millions of inhabitants and nations with less than one million? What about a nation with an economy measured in trillions of dollars as opposed to a country that relies on a single export commodity and has a total economic product less than many private corporations? In a diverse and ever-changing world, the freedom to negotiate individual codes is at a premium.

A private code serves as a general moral statement by MNEs.¹⁰¹ The code manifests a corporate intent to engage in ethical behavior and to obey the law.¹⁰² Thus, dissemination of the code would enhance a MNE's image in an area where "image enhancement is direly needed,"¹⁰³ and show that a MNE is sensitive to the needs of the host country.

Another advantage of voluntary codes is that they do not require congressional or parliamentary approval.¹⁰⁴ Business entities of all sizes can draft a voluntary code. Further, from a legal perspective, a private code may serve as a defense or mitigator when a corporation is sued for an employee's act which is forbidden under the corporate code of conduct.¹⁰⁵

A. *Criticisms of Private Codes of Conduct*

While private codes have the perceived legal effect of affording a company protection, some commentators note that only a few

101. *Id.* at 15.

102. *Id.* The information received in response to a survey administered in conjunction with this article reveals that the codes currently in place among the largest corporations arose mainly in the 1970s as a result of what has been termed the "sensitive payments" era. Corporations passed many internal codes of conduct partially in response to the Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494, 1498 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78-ff (1982)).

103. See Ewell E. Murphy, Jr., *The Echeverrian Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 *TEX. INT'L L.J.* 135 (1982). Murphy's allegory of the "Giant People" who roamed in the North refers to greedy U.S. investors who took resources from the Mexican people, leaving them with little gold and few skills in return. *Id.* at 135. With a history filled of such stories, a voluntary code may be an invaluable tool to heal old wounds.

104. See Fatouros, *supra* note 89, at 182.

105. Although few courts have considered the legal effect of corporate codes directly, courts have addressed the significance and impact of corporate codes. See Pitt & Groskaufmanis, *supra* note 36, at 1605.

courts consider corporate codes of conduct in their adjudication.¹⁰⁶ Further criticism suggests that private codes are not effective because their rules are easily circumvented and may be given no legal significance.¹⁰⁷ Others argue that codes based on morality stifle innovation.¹⁰⁸ Last, codes are often criticized as being nothing more than public relations ploys with little practical effect.¹⁰⁹

Because private codes of conduct are made on a voluntary basis, host countries may perceive the codes as informal and non-binding statements. However, host countries should not be misled by the informality of a voluntary code. As one commentator notes, "[e]ven these [voluntary guidelines] can have considerable impact, attract sanctions at least of public opinion, and influence national or international courts or other government officials."¹¹⁰

An additional problem for MNEs is the cost of implementing a private code. A code of conduct may take months or years to develop. In larger MNEs, this process involves extended negotiation with different departments, centered around the chief executive officers' department.¹¹¹ The code may require amendment to reflect the needs of the parties or to conform to changing social pressures.¹¹² Because of these costs, a code is likely to decrease profits to the shareholders in the short-run which could adversely affect the financial statements. This effect may especially concern small MNE's.

These costs, however, should be weighed against the benefits gained by adopting a code. A well drafted code may alleviate regional political instability, increase trade to that region, promote more competition to the marketplace, accelerate development in

106. *Id.* at 1606. A 1980 study found that over three-quarters of the officers surveyed believed that the code afforded protection for the company. *Id.* at 1605. Pitt & Groskaufmanis say that in reality, codes of conduct offer little protection against liability. *Id.* at 1605-14.

107. *Id.* at 1630.

108. *Id.*

109. *Id.* at 1630-31. The authors note that empirical studies support the findings that "there is little relationship between codes of conduct and corporate violations, contrary to the expectation that the codes serve as an effective form of self-regulation." *Id.* (citations omitted).

110. Professor John H. Jackson, Speech on Transnational Enterprises and International Codes of Conduct at the University of Michigan School of Law.

111. Interview with officer, Caterpillar Inc. (1992).

112. Periodically reviewing a code conforms the code to current needs, thus ensuring its enforceability. Second, it allows the MNE to assess the code's overall effectiveness. Third, it allows participants to determine with precision where revisions are needed. Fatouros, *supra* note 89, at 190.

poor regions of the world, and increase a region's standard of living. Further, an increased per-capita GNP may convert a poor nation into a nation of citizens who are consumers of MNE goods or services.

A well drafted code can increase the good will of MNEs, making host countries more willing to enter into business with them. This increase in business will help MNEs expand in the more competitive international marketplace and bring greater returns to MNEs and their shareholders.

Another concern of host countries may be the effective enforcement of these codes. Critics maintain that compliance programs are undermined by financial pressures, organizational dynamics, and ordinary social contacts.¹¹³ Others argue that codes of conduct have limited efficacy because there are few, if any, enforcement provisions.¹¹⁴ Even where enforcement provisions are present, one may argue that even the best procedures cannot stop intricate plans—there are limits to any compliance program.¹¹⁵ Codes with enforcement provisions may only outline procedures or rules for settling disputes and lack any concrete rules for specific activities.

These criticisms, however, may be overcome, in large part, by prudent drafting. Thus, a code containing concrete rules may become enforceable. A well drafted private code should contain the following:

- (1) a structure for settling disputes;
- (2) a mechanism for imposing sanctions;
- (3) machinery for disseminating and collecting information;
- (4) competent compliance monitoring; and
- (5) institutional arrangements to modify the code or formulate more detailed rules.

A well drafted code with similar provisions can be a powerful tool that will be well received by both the host country and the enterprise.

B. Success with Voluntary Codes: The Sullivan Principles

Evidence of the potential success of voluntary codes of con-

113. Pitt & Groskaufmanis, *supra* note 36, at 1631-32.

114. *Id.* at 1604-05.

115. *Id.* at 1632.

duct can be evaluated by examining the corporate experience in South Africa under the Sullivan Principles. Reverend Leon Sullivan, a black West Virginian Baptist minister, proposed the Sullivan Principles while serving as a member of the Board of Directors of General Motors Corporation in 1977.¹¹⁶ Sullivan established a program designed to promote social justice and eliminate apartheid.¹¹⁷ He wrote a code of conduct for U.S. corporations doing business in South Africa.¹¹⁸

Since their inception in 1977, the Sullivan Principles have affected apartheid¹¹⁹ and the attitudes of U.S. corporations and investors. The Principles fought apartheid by helping black South Africans gain workplace rights and by helping black industrial labor unions win official recognition.¹²⁰ Further, the Principles influenced U.S. corporations in South Africa by making them aware of injustices in the employment system,¹²¹ by providing a focus for company programs,¹²² and by unifying the companies to act as a group. The unification gave the corporations a sense of strength through numbers as they confronted social issues in South Africa.¹²³

By 1984, there were 125 signatories to this voluntary code.¹²⁴ The numerous adoptions indicate that a voluntary code of conduct, demanding responsibility beyond that which is legally required, may be successful where certain social and economic factors that

116. See Reverend Leon Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 LAW & POL'Y INT'L BUS. 427 (1983).

117. DAVID HAUCK ET AL., TWO DECADES OF DEBATE: THE CONTROVERSY OVER U.S. COMPANIES IN SOUTH AFRICA 97 (1983).

118. *Id.* at 97-98. The Sullivan Principles called for integrated workplaces, fair employment practices, and affirmative action. To become a signatory to the Principles, companies must express written commitment to them, prepare and submit an annual report or self-evaluation of progress, and pay a fee based on their aggregate worldwide sales. Anne R. Bowden, Note, *North Carolina's South African Divestment Statute*, 67 N.C. L. REV. 949, 949 n.3 (1989). A grading system also exists for measuring companies adherence to the principles. See HAUCK, *supra* note 117, at 106.

119. See Tony Bloom, *The Imperative of Enlightened Self-Interest in South Africa, in BUSINESS IN THE SHADOW OF APARTHEID: U.S. FIRMS IN SOUTH AFRICA* 134-35 (Jonathan Leape, et al., eds. 1985).

120. *Going All-Out Against Apartheid*, N.Y. TIMES, July 27, 1986, § 3, at 1.

121. Bloom, *supra* note 119, at 135.

122. DESAIX MYERS III ET AL., U.S. BUSINESS IN SOUTH AFRICA: THE ECONOMIC, POLITICAL, AND MORAL ISSUES 97 (1980). Some company representatives characterized the Sullivan principles as a catalyst that led companies to systemize programs for desegregation, training, and employee housing. *Id.*

123. HAUCK, *supra* note 117, at 103.

124. Bloom, *supra* note 119, at 221-23.

motivate corporations to comply with the code of conduct are present.¹²⁵

Although the Principles have not been a complete success, they do illustrate that private codes are and continue to be a vehicle for change. More importantly, the Principles are a source of guidance for corporations wishing to increase their social responsibility by adopting voluntary codes of conduct.

IX. CASE STUDY: SURVEY OF THE LARGEST MULTINATIONAL ENTERPRISES

While the Sullivan Principles represent a successful attempt by MNEs to join together against a clearly defined problem, private codes of conduct adopted by MNEs must be quite different. These internal guides for employees serve as codes of general applicability that provide broad principles to be applied to all situations in every country. To be effective, any code with such a scope must rely extensively on the integrity of the individuals in the corporation, as opposed to the visibility of the problems. In other words, the internal code of conduct is a repository of principles, rather than an accumulation of regulations. Tracing the steps from the principles embodied in any internal code to application in any given situation represents one of the greatest challenges in evaluating the effectiveness of the private code of conduct.¹²⁶

A. *Origins and Purposes of the Corporate Codes*

The origins of modern internal codes are found in three principle areas.¹²⁷ First, as the driving force behind their adoption, the MNEs cited a general desire to formulate a single ethical policy. Since disjointed corporate policies appear incapable of promoting ethical behavior in employees, specific emphasis is needed to change behavior. Second, the MNEs surveyed were concerned with

125. See Valerie A. Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B.C. ENVTL. AFF. L. REV. 457, 473 (1991).

126. The topic of the effectiveness of private codes of conduct is simply not ripe, because private codes of conduct in their current form have been in place for a short period of time.

127. The codes received in response to the survey should be distinguished from the Sullivan Principles. The codes attempt to take particular standards and problems encountered by the individual MNE and formulate general principles to guide all MNE employees. Alternatively, the Sullivan Principles outline actions in response to Apartheid in South Africa.

adhering to standards of behavior created by both host and home countries. An internal code can collect and distill the varying standards to which MNEs may be held.¹²⁸ Lastly, the survey showed that MNEs with internal codes attempted to establish better relations with both the host and home countries.

Some critics seize upon this last element to support their argument that corporate codes merely serve as public relations ploys. However, the survey results demonstrate that the effort to establish the codes usually extends to the highest echelons of the corporation with the auditing or the legal departments responsible for implementation.¹²⁹ This indicates that MNEs are not merely making a public relations ploy, but are in fact seeking to abide by their codes.

B. Advantages and Pitfalls of Internal Codes

Undoubtedly, MNEs with internal codes are looking to eventually realize economic returns by adhering to their stated principles. A benefit of good corporate behavior may be higher profits and preferential relations with the host country. An internal code is a long-term investment purchased by an MNE at a cost, however. Such costs include the development, circulation, and implementation of the plan. In addition, the MNEs surveyed recognized that corporations, by adhering to their codes, were at risk of putting themselves at a competitive disadvantage in some parts of the world.

Yet, some corporations noted that having a code and not enforcing it is worse than not enacting a code in the first instance. The corporation that allows others, specifically host countries, to rely upon its code in making decisions, may actually damage itself more by not following through on the code's promises, than by not enacting an internal code in the first instance. Two plausible reasons for this conclusion exist. First, by ignoring their own private code, the MNE risks not only being viewed as an unethical business partner, but also as an untrustworthy one. An MNE without any code may be viewed as just like all the others. But an MNE

128. An array of international and industrial groups have written codes of conduct to regulate MNEs. The ICC and OECD are two from among this group. *See supra* part VII. An internal code allows MNEs to adopt standards from these organizations' codes without allying with occasionally conflicting groups.

129. *See infra* notes 154-157 and accompanying text.

with an internal code that it does not adhere to may be viewed as fraudulent and, thus, *worse* than all the others. This would destroy the goodwill internal codes might otherwise generate.

The second explanation is the possibility that an internal code may eventually become evidence of a reasonable legal standard to which the MNE should be held. While there is currently little case law supporting this proposition, Pitt and Groskaufmanis warn of its possibility.¹³⁰ The likelihood of this contingency may grow as MNEs are brought into the courts of the United States as a result of allegedly negligent behavior abroad.¹³¹

To offset the costs of an internal code, MNEs hope that, over the long-term, other companies and nations will prefer to do business with corporations that have adopted and followed internal codes. Adherence to the codes develops trust in the relationship between the MNE and its suppliers, host government, and customers. Suspicion historically surrounds the activities of MNEs abroad.¹³² Alleviation of this suspicion is the chief benefit of writing and adhering to an internal code. If this goal is achieved, the MNE should gain more over the long-term than it lost in developing and following the code.

C. Substance of the Codes Surveyed

This author surveyed the fifty largest multinational corporations.¹³³ Although the response to the survey was limited, the answers and documents returned provide some insights into the origins, purposes, and contents of the private codes of the largest MNEs. The extant codes are similar in form to the Sullivan Principles and the U.N. Draft Code of Conduct. However, the internal codes reviewed were broader than the Sullivan Principles and more lenient than the U.N. proposal. The codes surveyed are realistic attempts by MNEs to guide employees in conducting corporate

130. Pitt & Groskaufmanis, *supra* note 36, at 1605-17.

131. The Supreme Court of Texas has recently caused an uproar by abolishing *forum non conveniens* dismissal in cases involving wrongful death. See *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

132. See Patricia M. Robin, Comment, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 956 n.172 (1984); see also Goler T. Butcher, *The Immediacy of International Law for Howard University Students*, 31 How. L.J. 435, 440 (1988) (noting the hostile attitudes toward foreign investment of a decade ago).

133. The MNEs surveyed were taken from a 1992 *Forbes* survey of the largest U.S. multinationals. *U.S. Corporations With the Biggest Foreign Revenues*, FORBES, July 20, 1992, at 298. The author received nine responses.

business with integrity. An analysis of the survey is presented below.

The codes received in response to the survey varied widely as to both form and content.¹³⁴ A review of the codes demonstrates that the Caterpillar Code most specifically addresses the problems encountered by multinationals when operating abroad.¹³⁵

Modern internal codes may be broken into three parts. The introduction defines the relationship between ethical conduct and the long-term goals of the corporation. The body of the document usually focuses on one or more areas of particular interest to the promulgating MNE. Last, most internal codes contain some type of enforcement and compliance provision.

D. Preliminary Statements and Introduction

The contemporary internal code begins with a definitive statement of the corporation's goals. The long-term interests of the shareholders are usually given priority from the outset. By beginning in this manner, these documents dispense with any suspicion that the code of conduct is a vehicle for transforming a capitalist entity into a humanitarian institution. Rather, the message conveyed is that the corporate officers have determined that, over the long-term, the interests of the shareholders will be enhanced—if their managers act ethically. This underscores the generally pragmatic nature of these documents. In sum, codes define the means MNEs are willing to employ without significantly altering the ultimate goals of the entity.

134. The codes reviewed may be divided into three basic categories. First, the codes of general applicability promulgated by corporations such as IBM and Hewlett Packard were geared toward employees at all levels in all countries. Second, a small group of corporations have devised statements of "ethical business practices" that are coupled with corporation position papers dealing with areas of particular interest to the MNE. This approach was prominent in the industries with large stakes in intellectual property such as Merck and Co. The third broad class of internal codes addresses the problems of employees conducting business in host countries. General Electric, for example, uses a code of general applicability which incorporates "international relationships and practices." Caterpillar Inc. formulated a comprehensive code of conduct which is clearly directed toward employees in host countries.

135. For this reason, the author selected the Caterpillar Corporation's code of conduct as illustrative of the fundamental issues addressed in this paper. CATERPILLAR INC., CATERPILLAR CODE OF WORLDWIDE BUSINESS CONDUCT AND OPERATING PRINCIPLES (1992) [hereinafter CATERPILLAR CODE]. While the Caterpillar Code is used extensively throughout this portion of the paper, virtually all private codes of conduct address the same problems. The emphasis on the Caterpillar Code arises not from its unique nature, but rather from its emphasis and clarity.

The Caterpillar Code illustrates this point. This Code commences with a definitive statement of the goals of the corporation. The enhancement of the long-term interests of the stockholders is given priority from the outset.¹³⁶ The document further states that the corporation is attempting "to take a long range view of things,"¹³⁷ and the stockholders' interests, as well as long-term profitability, are best served "through fair, honest, and intelligent actions"¹³⁸

E. Specific Areas of Interest

Virtually all internal codes of conduct address, in some form, several areas which present problems for employees operating in host countries. The codes generally address business relations in the host country, the interaction of the MNE with the culture of the host countries, and relations with the governments of the host countries. Although no two codes are identical in their approaches to these areas, the motivation in every case appears to be a desire to define the parameters of MNE involvement with the host country.

In general, internal codes outline a methodology for company managers to employ when dealing with differing business practices. Inevitably, conflicts will arise between MNEs and their host countries' suppliers and customers. The problems encountered in any country will inevitably vary, and in recognition of this, most internal codes introduce an element of flexibility into their management systems to help alleviate the conflicts that do arise. The Caterpillar Code takes this approach. This Code recognizes that "there are differences in business practices and economic philosophies from country to country."¹³⁹ The Code continues by asserting that there "isn't necessarily one best way,"¹⁴⁰ and states a clear preference for "more uniform business practices among countries and encourage[s] multilateral efforts to harmonize business practices and

136. *Id.* at 1.

137. *Id.*

138. *Id.* The Code states:

The company's most valuable asset is a reputation for integrity. If that becomes tarnished, customers, investors, suppliers, employees, and those who sell our products and services will seek affiliation with other, more attractive companies. We intend to hold to a single standard of integrity everywhere.

Id.

139. *Id.* at 9.

140. *Id.*

procedures."¹⁴¹

While these statements are not a pledge to remain neutral, they do appear to give Caterpillar managers operating in host countries latitude to enter into negotiations with the understanding that business practices may be changed. The reference to multilateral efforts¹⁴² recognizes the growing trend toward trading blocks and groups, which is an attempt by host countries to gain a competitive advantage over powerful MNEs, which often have revenues dwarfing the GNPs of many host countries.

This fundamental imbalance of power leads to continuous scrutiny of MNEs. Foreign corporations are sources of apprehension for many host countries. To allay these fears, internal codes attempt to address the interaction between the MNE and the culture of the host country. The typical internal code of conduct acknowledges the socio-economic problems which may develop or be accentuated by the presence of large MNEs in a developing country.¹⁴³ These modern documents encourage cooperation between the host country and MNEs. Through cooperation, as opposed to antagonism, MNEs may address their impact beyond their own corporate compound.

The Caterpillar Code has a tripartite approach to managing the impact of the MNE on the socio-economic environment of the host country. This Code recognizes that public responsibility is vested in the company in three broad areas: "First, is the straightforward pursuit of daily business affairs The second category has to do with conducting business affairs in a way that is socially responsible The third category relates to initiatives beyond our operations, such as helping solve community problems."¹⁴⁴

The reason for these three elements is summarized in the Code itself. The company desires that "Caterpillar's business activities make good social sense — and that Caterpillar's social activities make good business sense."¹⁴⁵ These provisions of the Caterpillar Code, taken together, show a concern for the environment in which the corporation operates.

The Caterpillar approach is consistent with the position

141. *Id.*

142. *Id.*

143. *See, e.g., id.* at 9-11.

144. *Id.* at 10 (emphasis in original).

145. *Id.*

adopted in the U.N. Draft Code of Conduct. That document states that, "[w]hile economic and technological development is normally accompanied by social change, transnational corporations should avoid practices, products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by Governments."¹⁴⁶ Thus, both the U.N. Draft Code of Conduct and the Caterpillar Code recognize the potential impact of an MNE on a host country and call for social responsibility on the part of the corporation.

F. Governmental Relations Between Host Countries and Surveyed MNEs

The nature of MNEs' involvement with host countries leads to interaction between corporate personnel and government agents. In general, private codes of conduct address the potential problems that may arise from this contact.

The analysis of this interaction is bifurcated. The first level is the systemic or legal level where MNEs are regulated entities subject to the laws of the host country. The second level is personal in nature as it involves the interaction between corporate and government employees.

The Caterpillar Code addresses both these areas in a direct manner. At the quasi-legal level, this Code states that while the laws of the host country must be obeyed, the company expects to be a source of "constructive ideas for change in the law."¹⁴⁷ These ideas are presumably to facilitate the concept that laws, in the eyes of the MNE, are "not an end but a means to an end — the end presumably being order, justice, and, not infrequently, strengthening of the governmental unit involved."¹⁴⁸ The Code also states that "Caterpillar will offer recommendations to governments concerning legislation and regulation," and will "selectively analyze

146. *Draft Code of Conduct*, *supra* note 70, ¶ 13.

147. CATERPILLAR CODE, *supra* note 135, at 11.

148. *Id.* The corporate preference for stability as presented in a private code leads to support for the government of the host country. While this almost certainly should be a stance welcomed by the government of the host country, this position may lead to criticism from opposition elements within the host country. In the case of Caterpillar Inc., the stated desire to foster stability in the host country is clearly in the interests of the corporation. To a great extent, the governments of host countries are the present and future customers for this company. This status leads to a desire for achieving stability to provide an atmosphere in which development and equipment purchases may take place. *See id.* at 13.

and take positions on *issues* which affect the company"¹⁴⁹

This position is markedly different from the proposed U.N. Draft Code of Conduct which implies corporate subrogation to all governmental policies, and states that "[w]ithout prejudice to the participation of transnational corporations in activities that are permissible under the laws . . . of host countries . . . transnational corporations shall not interfere in the internal affairs of host countries."¹⁵⁰ Recognizing the potential disruption that may result from the application of its Code provisions, Caterpillar does however intimate that it will "obey the law" while also offering constant ideas for its change.¹⁵¹

The second level of relations, the interaction between corporate and government employees, is addressed by the Caterpillar Code in much the same manner as the other private codes reviewed by this author.¹⁵² The provisions dealing with this area target payments or gifts from the MNE to government officials. The Caterpillar Code requires that employees not "seek to influence sales of [Caterpillar] products (or other events impacting on the company) by payments of bribes, kickbacks, or other questionable inducements."¹⁵³ However, although "employees are required to make good faith efforts to avoid payment of gratuities or 'tips'" such payments may be made in customary amounts when they "are as a practical matter unavoidable."¹⁵⁴

149. *Id.* at 10 (emphasis in the original).

150. *Draft Code of Conduct*, *supra* note 70, ¶ 16.

151. CATERPILLAR CODE, *supra* note 135, at 11. This is both a blessing and a curse. The topic of this paper is the content of the modern internal code, not the ethical or developmental validity of these documents. A situation in which a MNE has entered a host country and finds itself bolstering a corrupt government by its presence and adherence to the host country's laws is easily foreseeable.

152. *See id.* at 11. In this area the United States based corporation is attempting to comply with the terms of the Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494, 1498 (1977) (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff (1988)), and parallel standards of the host country or MNE itself. Pitt and Groskaufmanis attribute the formation of some codes to passage of the FCPA. Pitt & Groskaufmanis, *supra* note 36, at 1582. Whether the fear of sanctions under the FCPA or the desire to avoid the scandals which led to the Act's passage played a role in bringing the need for codes to the attention of MNEs is an open question. However, at the very least, payments from corporate officials to government employees is subject to multiple standards addressed by the private codes. The Caterpillar Code closely mirrors the standard of the FCPA.

153. CATERPILLAR CODE, *supra* note 135, at 11.

154. *Id.*

G. Enforcement

None of the provisions adopted by any private code would be effective without some type of enforcement mechanism. While many private codes present coherent, manageable standards for employees operating in host countries, the problem of enforcement and sanctions still exist. Recognizing that return on investment and the operation of the business on a daily basis may distract employees from adhering to the terms of the codes, each document contains some compliance provisions.

The private codes reviewed in conjunction with this paper contain varying methodologies to make them functional in a real life business setting. For example, the Caterpillar Code requires selected senior company managers to prepare memoranda reporting "events or activities which might cause an impartial observer to conclude that the code hasn't been followed."¹⁵⁵ These yearly reports are conveyed to the office of the General Counsel for review.¹⁵⁶

Alternatively, some corporations, such as General Electric (GE), have provided reporting addresses to employees who see possible violations.¹⁵⁷ A third approach, taken by Merck and Co., included retaining an outside firm to operate an "alertline."¹⁵⁸ These

155. *Id.* at 13.

156. *Id.* The responsibility of the corporate counsel to investigate and notify the corporate management or the board under general rules of professional conduct is an additional layer of the enforcement of codes in a corporate setting. For a related article raising some of the issues of ethical compliance, see Roger J. Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1 (1981).

157. GE's experience underscores the difficulty of enforcing an internal code of conduct. See Amal K. Naj, *GE's Drive to Purge Fraud is Hampered by Worker's Mistrust*, WALL ST. J., July 22, 1992, at A1. GE recently plead guilty to charges relating to a high GE official who diverted funds to an Israeli general. This incident occurred despite an elaborate enforcement mechanism instigated by the company. *Id.* GE presents seminars and videos on the internal compliance system and quizzes employees on available reporting methods. *Id.* There are also toll free numbers, special reporting forms, and avenues for sending anonymous notes to the chief executive. *Id.* at A6. Despite all these efforts, employees state that the strong attempt to encourage reporting is "hampered by a culture that puts extreme emphasis on profit." *Id.* at A1.

This comment underscores the need to make the internal code of conduct an integral part of the corporate culture. Ultimately, the success of any code will depend upon the individuals within the corporation. The shift in attitudes necessary to achieve full implementation of the codes at every level of the corporation will doubtlessly be a long and painful process in many corporations.

158. The firm, Business Risks International, specializes in taking anonymous complaints and forming reports to be forwarded to Merck's General Counsel.

three forms of compliance constitute virtually all the alternatives open to internal enforcement, with the exception of forming an internal ethical auditing service (this idea may be viewed as a subset of Merck's compliance system).

To critics, these methods of enforcement may seem like substitutes for avoidance and corporate cover-ups. This argument is not without merit. However, any method of enforcement will ultimately turn on the willingness of individual employees to report possible misconduct. Further, this author also notes the lack of definite sanctions in many of these codes. Though the codes may direct or proscribe conduct, they often fail to enumerate the penalties for non-compliance. In this regard, one can argue by inference that to violate a code provision is tantamount to improper behavior punishable by discharge.

H. Corporate Motives Behind Private Codes

Are private codes and their enforcement provisions merely public relations tactics? Alternatively, do the public relations aspects of private codes outweigh or hinder the beneficial effects of private codes of conduct? Even a cursory response to this issue requires a review of the essential principles and goals which any code, public or private, should pursue.

From the perspective of the business community, the codes help to create a necessary climate of mutual confidence for international investment. However, at least one author realizes that the potential benefits of an enforceable international code may easily be exaggerated:

Achievement of a generally acceptable code would not do a great deal to satisfy demands for a massive transfer of resources from North to South, for such a transfer of resources is not within the legal or economic power of privately owned corporations. A code, however, would be at least one perceptible indicia of cooperation.¹⁵⁹

159. Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 30 AM. U. L. REV. 903, 920 (1981).

For a thorough discussion of the role, content, and potential of voluntary codes of conduct, see *Symposium: Codes of Conduct For Transnational Corporations*, 30 AM. U. L. REV. 903 (1981). While these articles do not address the efforts by individual MNEs to adopt internal codes of conduct, many of the issues presented concern international corporate conduct.

One may conclude that the internal code, like the U.N. Draft Code, is primarily a symbol of cooperation with and a pledge by MNEs not to hinder the development of host countries through their ongoing operations in the host country. The adoption of internal codes indicates a desire to cooperate. Since any offer to cooperate is in some sense a public relations tactic, the corporate codes necessarily involve public relations.

However, this categorization of private codes as public relations tactics underscores the role of private codes rather than negating their true value. When private codes are followed, they improve the situation of all trading parties. The private codes achieve at least some of their purposes if they allay fears and lead to cooperation between MNEs and host countries. MNEs adopt private codes because they are justifiable in light of the alternatives which confront MNEs in the emerging global business arena. At a minimum, they are attempts to define the parameters of dealings between historically adverse parties.

An analysis of the recent literature indicates there is a growing consensus that multinationals should be held accountable.¹⁶⁰ Several national and international entities have asserted the desire and the right to regulate MNEs.¹⁶¹ Host countries wish to regulate the operations of MNEs to satisfy the demands of their own citizens and commercial entities.¹⁶²

For example, during the 1970s, host countries began to reassert control over natural resources and thereby control MNEs within their borders. Indeed, MNEs have been plagued for some time by expropriation and nationalization of their property located

160. See Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1378-79 (1991); Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 194 n.10 (1985).

161. See *supra* note 93; see also Cecilia M. Waldeck, Note, *Proposals for Limiting Foreign Investment Risks Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1193 (1991) (referring to Canada's national regulatory body which reviews and approves foreign owned businesses); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 667 (arguing that trade unions must establish transnational organizations to confront MNEs on an international basis).

162. See generally David W. Beebrom, *Symposium — Just Winners and Losers: The Application Game Theory to Corporate Law and Practice: A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation*, 60 U. CIN. L. REV. 305, 305 (1991) (stating host countries impose regulations on MNEs such as requiring employment of local citizens); Janelle M. Diller, *Title VII of the Civil Rights Act of 1984 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1466 (1985) (demonstrating that U.S. regulation of MNEs traditionally protected U.S. commercial interests).

in host countries.¹⁶³ During the mid-1970s the threat of expropriation and nationalization was greatest. "The number of expropriations in 1975 was 4 times that of 1970 and 50 times that of 1961."¹⁶⁴ An executive of Mobil Oil Corporation expressed the force with which some host countries have acted: "If they wish to nationalize us, they do so. If they wish to eject us, they do so."¹⁶⁵ Moreover, the threat of expropriation and nationalization continues to concern MNEs today.¹⁶⁶

In addition to the actions taken by host countries, many home countries are recognizing a need to regulate the external activities of MNEs based within their own borders. The FCPA is an example of an attempt to exercise this power.¹⁶⁷ Further, the U.N. is also developing a code that would regulate the activities of MNEs.¹⁶⁸ All of these bodies, host countries, home countries, and organizations have concurrent authority to regulate MNEs.¹⁶⁹

MNEs confronted with this array of potential sources of regulation could well find the cost of developing and enforcing an internal code of conduct defensible. Although MNEs may lose some business to unethical companies in the short-run, the code may allay the fears of governments, trading parties, and the international community.

163. David G. Bradley, *Managing Against Expropriation*, HARV. BUS. REV., July-Aug. 1977, at 75-78; see also Acquaaah, *supra* note 3, at 163; TURNER, *supra* note 6, at 13, 92.

164. Bradley, *supra* note 163, at 78.

165. Faneuil Adams Jr., Vice-President of the Mobil Oil Corporation, Comments to the Conference on the Regulation of Transnational Corporations at Columbia Law School (1976).

Although the oil industry is an example of a successful attempt by less developed countries to exert control over MNEs, other fields have not consistently reproduced similar results.

166. In December 1991, largely for the purpose of attracting MNEs to conduct business in their states, 48 countries signed the pan-European Energy Charter. See generally *Energy: Europe Signs Charter on Energy Supply*, Inter-Press Service, Dec. 17, 1991 available in LEXIS, Nexis Library, Inpres File. The Charter seeks to forbid nationalization of corporate assets. *Id.*

167. FCPA, *supra* note 102. Note that the public outcry over the corporate scandals that led to passage of the FCPA represents an event which most MNEs desire to avoid. Public awareness of corporate indiscretions in the environmental field led to policy changes by many multinationals. The adoption of private codes may be an attempt to avoid such public criticism over corporate conduct in other areas.

168. See *Draft Code of Conduct*, *supra* note 70.

169. See generally William L. Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Freuhauf v. Massardy*, 83 HARV. L. REV. 579 (1970) (an example and discussion of the problems that arise when two countries attempt to regulate the same transaction).

X. CONCLUSION

MNEs should adopt private codes of conduct because such codes are socially responsible. Codes of conduct written by MNEs may bring more stability and predictability to relations between MNEs and developing nations. Private codes may also increase the return on shareholder investment, the MNEs' ultimate objective.¹⁷⁰ As the free market takes its course, MNEs with the most balanced codes will gain the trust and confidence of host countries and will accordingly receive competitive advantages. The effect of these advantages should drive other MNEs to adopt their own codes.

Moreover, regardless of the competitive reasons to adopt a code, MNEs should consider their adoption because they are a long needed vehicle of change. MNEs must recognize that their time of complete dominance over developing nations is winding down. They are held to increasingly strict standards of fair and ethical conduct. Adhering to these standards will aid in ensuring the long-term stability of the corporation and the host country. As a result, the parties can create an atmosphere which will allow MNEs to profit and expand, while cooperating with the host country as it struggles to enter the ranks of developed nations.

MNEs will continue to debate the value of adopting private codes of conduct. However, private codes, when enforced, are potentially powerful devices.¹⁷¹ Although there are obstacles to implementing any private code of conduct, problems will occur regardless of whether rules emanate from public international law or from internal policy.

One should not dismiss these instruments merely because they are somewhat flawed. Since private codes provide flexibility, may be negotiated, and can be narrowly tailored to the needs of the parties, they are a potentially more effective mechanism for achieving the root purpose of any code of conduct. That is, they can facil-

170. This is especially true if self-regulation through the codes is perceived as a viable alternative to national or international regulatory schemes, the cost of which will probably be borne by MNEs themselves.

171. Changes are never easy and historically involve great debates. "William Bradford reported how the Pilgrims, having taken temporary refuge in Holland, debated their voyage to America." BOORSTIN, *supra* note 10, at 599 (emphasis omitted). "It was answered, [in reference to the great debates], that all great, and honourable actions are accompanied with great difficulties, and must be both enterprised and overcome with answerable courages. It was granted the dangers were great, but not desperate; the difficulties were many, but not invincible." *Id.* at 600 (quoting William Bradford).

itate mutually beneficial exchange in a global marketplace. Simply stated, private codes of conduct make good business sense and fulfill an obligation to behave as good neighbors in an increasingly smaller world. In the words of Franklin D. Roosevelt, “[i]n the field of world policy I would dedicate this nation to the policy of the good neighbor—the neighbor who respects . . . his obligations and respects the sanctity of his agreements in and with a world of neighbors”¹⁷²

172. Franklin D. Roosevelt, Inaugural Address (Mar. 4, 1933), *in* ROOSEVELT'S FOREIGN POLICY, 1933-1941 3 (1942).